IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Robert Ray Viramontes,

Petitioner,

v.

Charles L. Ryan, et al.,

Respondent.

No. CV-16-00151-TUC-RM (BPV)

REPORT AND RECOMMENDATION

Pending before the Court is Petitioner Robert Ray Viramontes' Pro Se Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody (Non-Death Penalty). (Doc. 1). Respondents filed a Limited Answer to Petition for Writ of Habeas Corpus (Doc. 22), and Petitioner filed a Traverse (Doc. 23). This matter was referred to Magistrate Judge Bernardo P. Velasco for a Report and Recommendation pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure. (Doc. 9). For the reasons stated herein, the Magistrate Judge recommends that the District Court find the petition is timely, grant Petitioner's § 2254 Petition, and remand to the state court for further proceedings consistent with this Report and Recommendation.

FACTUAL AND PROCEDURAL HISTORY

On December 24, 1998, Petitioner got into a fight at a party, and someone broke a bottle over his head.[1] (Pet. Exh. C, Doc. 1-1 at 53). One of the party-goers helped

[1] Petitioner does not dispute the summary of events. In addition, factual findings by the state court are given the presumption of being correct absent clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1); *Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007); *cf. Rose v. Ludy*, 455 U.S. 509, 519 (1982).

Petitioner and escorted him from party. (*Id.*). Then early Christmas Day, Petitioner broke into a home with two accomplices. (*Id.*) Petitioner attacked two victims with a Samurai sword, killing one. (*Id.*). The party-goer who aided Petitioner the previous night testified he heard Petitioner's voice as the assailants fled. (*Id.*). When the Petitioner was arrested, he admitted he was at the party the night before, and had returned and attacked the victims the following day. (*Id.*).

- **PLEA AGREEMENT AND TRIAL**

Petitioner was charged with first-degree murder, first-degree burglary, and two counts of aggravated assault. (Pet. App'x C, Doc. 1-2 at 167-68). The state offered Petitioner a plea agreement: In exchange for pleading guilty to second-degree murder and aggravated assault, Petitioner would receive no less than 20 years' incarceration for the second-degree murder conviction. (Pet. Exh. I, Doc. 1-2 at 20). Combined with the aggravated assault sentence, the maximum Petitioner could have been sentenced to under the plea agreement was between 20 - 43 years' incarceration. (Pet. Exh. O, Doc. 1-2 at 223).

Prior to trial, the state again offered the plea agreement. (Pet. App'x B, Doc. 1-2 at 32). While discussing the proposed plea, Pima County Superior Court Judge John S. Leonardo stated:

> THE COURT: Without [the plea], the first degree murder carries a potential life sentence, *probation at 25 years or no probation*?
>
> [THE STATE]: The -- it would be -- first degree would be -- I believe, it would be *probation after 25*.
>
> . . .
>
> THE COURT: [Defense counsel,] have you discussed that with -- this offer with your client or do you wish to?
>
> [DEFENSE COUNSEL]: I have -- Your Honor, I think there would have been a chance if it wasn't set on the floor, as he called it, of 20 [years' incarceration]. I explained to the defendant he is 19 [years old], if he got [a] 20 [year sentence], you know, he could be out before he is 40 [years old], *otherwise he's looking at possibly never getting out of prison*, but I'm satisfied, Your Honor, that as he sits

here today, he is not interested in that plea.

THE DEFENDANT: (Nods head.)

THE COURT: All right. So that you know, Mr. Viramontes, *the potential penalty for first degree murder, with which you are charged, is life; if you're convicted of first degree murder, you must receive life.*

. . .

THE COURT: Yeah, so the sentences would have run together, even if you were convicted of all of them, except that Count 4, which is the 7-21 [years' incarceration], could be consecutive, *but if you were convicted on Count 1, it wouldn't matter because that's a life sentence anyway* and according to the [plea] offer made by the State then you would be looking at a maximum of -- a minimum of 20 years, according to their offer.

. . .

THE COURT: So as long as you understand that, Mr. Viramontes, and it's entirely up to you whether you wish to go to trial or whether you wish to accept the State's offer and if you want to discuss it further with your attorney, I'll give you time to do it. If you don't need to, then you can let me know that too.

THE DEFENDANT: Your Honor, I don't want it.

THE COURT: You don't want the plea offer?

THE DEFENDANT: No, sir.

THE COURT: You wish to go to trial?

THE DEFENDANT: Yes, sir.

. . .

THE COURT: All right. We'll impanel a 12 person jury then. Clearly, *it would be in excess of -- potentially, over 30 years.* All right.

(*Id.* at 35-36) (emphasis added).

The following morning, the trial court again discussed a plea. At that time, the court asked the prosecutor if he would be willing to offer a plea agreement that

would allow the trial court to sentence Petitioner between 10 - 22 years' incarceration for second-degree murder. (Pet. App'x C, Doc. 1-2 at 45). However, the prosecutor was unable to get authorization from his supervisor to offer these terms. (*Id.* at 54). Petitioner again rejected the original plea, and the case proceeded to trial. (*Id.*).

On September 22, 1999, Petitioner was found guilty on one count of first-degree murder, two counts of aggravated assault, and one count of first-degree burglary. (Doc. 1 at 1-2).

The Presentence Report ("PSR") calculated Petitioner's possible sentence:

- If sentenced to natural life, not subject to commutation or parole, work furlough or work release
- If sentenced to life, no release on any basis until the completion of the service of 25 calendar years

(Doc. 28 at 3); *see* A.R.S. § 13-751(A)(2).

The state court's Judgment of Commitment Order stated:

> Defendant is sentenced to a term of imprisonment . . . as follows:
> Count 1: 25 years; Counts 2 & 3: 10 years each count, concurrent with each other and with Count 1 and consecutive community supervision of 17 months; Count 4: 10.5 years consecutive to Count 1 and community supervision of 18 months.

(Pet. Exh. A, Doc. 1-1 at 4). Thereafter the order contained the additional language: Count 1: "Life With No Release On Any Basis Until The Completion of the Service of 25 Calendar Years." (*Id.* at 5).

No appeal or motion for resentencing was filed by the prosecutor.

- **DIRECT APPEAL**

On July 3, 2000, Petitioner filed an appeal to the Arizona Court of Appeals on issues not related to the present habeas petition. (Pet. Exh. B, Doc. 1-1 at 11-48). The appellate court affirmed the trial court's conviction and sentence. (Pet. Exh. C, Doc. 1-1 at 52-61). Petitioner appealed, and on March 20, 2001, the Arizona Supreme Court denied Petitioner's direct appeal. (Resp. Exh. B, Doc. 22-1 at 5).

Petitioner did not appeal to the United States Supreme Court. (Doc. 1 at 3).

- **INITIAL PCR PETITION**

On April 3, 2001,[2] Petitioner filed a Notice of Post-Conviction Relief ("PCR"). (Resp. Exh. C, Doc. 22-1 at 7). Petitioner was then appointed counsel who filed a Rule 32 PCR Petition. (Resp. Exh. D, Doc. 22-1 at 11). The petition raised allegations that are inconsequential to the instant habeas petition. The trial court denied the PCR Petition on May 23, 2002. (Pet. Exh. G, Doc. 1-1 at 114-118). Petitioner appealed to the Arizona Court of Appeals. (Pet. Exh. H, Doc. 1-1 at 120). The appellate court denied relief on June 16, 2003, and the mandate issued on August 20, 2003. (Resp. Exh. F, Doc. 22-1 at 34-42). Petitioner did not appeal to the Arizona Supreme Court. (Doc. 1 at 5).

- **SUCCESSIVE PCR PETITION**

On April 17, 2014, Petitioner filed a Pro Se PCR Notice, claiming he had newly-discovered evidence under Arizona Rule of Criminal Procedure 32.1(e), and arguing his failure to file a timely petition was through no fault of his own, as required under Rule 32.1(f). (Pet. Exh. O, Doc. 1-2 at 199-203). He claimed that he was told that if he proceeded to trial, his sentence would be life with release at 25 years. (*Id.* at 202). He stated trial counsel was ineffective because counsel told Plaintiff to reject the plea, explaining he would only receive five additional years' incarceration if he lost. (*Id.*). Petitioner claimed he had the right to have his plea agreement reinstated because the state and defense counsel never told him that the only way he could be released was by a pardon or commutation by the governor. (*Id.*). He asserted that it was only recently that the Arizona Department of Corrections informed him that there was no release for a life sentence unless granted by the governor. (*Id.*). Petitioner also claimed that the capital sentencing laws were unconstitutionally vague. (*Id.*).

[2] Respondents note that the filing date should follow the prisoner mailbox rule. (Doc. 22 at 3). Assuming this is the effective date of filing, it is not relevant to the Court's determination. The Court finds the time is equitably tolled. Even if it were not, the filing date is years over the AEDPA time limit.

The trial court appointed counsel for Petitioner. (*Id.* at 205). Petitioner then filed a successive Petition for Post-Conviction Relief on August 26, 2014, alleging ineffective assistance of trial and PCR counsel, and trial court error. (Pet. Exh. I, Doc. 1-2 at 25-26). However, in the petition, PCR counsel failed to raise the newly-discovered evidence issue that was in Petitioner's notice. (Resp. Exh. G, Doc. 22-1 at 52). Instead, counsel argued that Petitioner was informed by the court, the prosecutor, and trial counsel that he would be eligible for "release" after 25 years' incarceration. (Pet. Exh. I, Doc. 1-2 at 21). Everyone present at the hearing was under the impression that the court's use of the word "probation" clearly meant parole. (*Id.*). Furthermore, he stated defense counsel failed to inform him of the consequences of receiving a consecutive sentence. (*Id.* at 23). Because of the Truth in Sentencing laws, Petitioner could not "be released from his life sentence" and because of this, he would never be able to begin his consecutive 10.5 year burglary sentence. (*Id.*) Petitioner opined that the Truth in Sentencing laws have constructively prevented him from having any plausible opportunity for release. (*Id.* at 22). Petitioner stated that had he known he would not be eligible for parole, and been advised his only possibility for release was by petitioning the Arizona Board of Executive Clemency ("ABEC") and then approval by the governor, he would have taken the plea. (*Id.* at 24).

The trial court denied Petitioner's successive PCR petition, stating that the petition failed to raise a cognizable basis for relief under state law for successive PCR petitions.[3] (Resp. Exh. G, Doc. 22-1 at 54). The trial court noted that insofar as Petitioner raised a *Martinez* claim of ineffective assistance of PCR counsel, *Martinez* related only to federal habeas petitions, and did not permit Petitioner to raise an ineffective assistance of PCR counsel after a trial in a successive state PCR petition. (*Id.* at 52-53) (citing *State v. Escarino-Meraz*, 307 P.3d 1013, 1014 (Ariz. App. 2013)). It dismissed the ineffective assistance of trial counsel claim as precluded under Rule 32.1, because it could have been raised on direct appeal or in his previous PCR petition, and Petitioner had not tied this

[3] The denial was not authored by the same judge who presided over the original trial proceedings, Judge Leonardo. Instead, the PCR petition was reviewed by Judge James E. Marner.

claim to any exception, including a claim of newly-discovered evidence. (*Id.*) (citing *State v. Herrera*, 905 P.2d 1377, 1381 (Ariz. App. 1995); Ariz. R. Crim. P. 32.2(b), 32.1(d)-(h)).

Furthermore, the trial court stated that Judge Leonardo had adequately informed Petitioner of the possible sentence and did not indicate he would be subject to parole. The trial court stated,

> It is the [P]etitioner's position that during a hearing conducted on the day prior to trial, when discussing the differences between the two types of life sentences the petitioner was exposed to upon conviction—life and natural life—this Court meant "parole" when it used the term "probation." . . . There is simply no basis for the [P]etitioner to assert that the Court meant one word when it used another and that everyone in the court that day shared in the Court's errant meaning. . . . Rather, the Court clearly informed petitioner that he would spend the rest of his life in prison if convicted. Because the petitioner's claim that this Court misled him depends upon the petitioner's misstatement of the record and because this Court correctly informed the petitioner, pre-trial, of the potential sentence he is currently serving, the petitioner's claim that this Court committed error falls short."

(*Id.* at 54).

Petitioner filed a Motion for Reconsideration, arguing that the newly-discovered evidence issue he raised in his notice was merely supplemented by PCR counsel's petition. (*Id.* at 56). The trial court ruled that PCR counsel's filing was the functional PCR petition, counsel had abandoned the issue of newly-discovered evidence, and likely dropped the issues because they had no merit. (*Id.*).

Petitioner filed a Petition for Review in the Arizona Court of Appeals on January 12, 2015. (*Id.* at 44-48). Petitioner first claimed that his sentence was unconstitutional because he was now serving a sentence longer than what was originally imposed by the court – a sentence which allowed release by parole dependent on good behavior, not simply the remote possibility of gubernatorial release. (*Id.* at 45-46).

Second, Petitioner claimed he could not have waived his ineffective assistance of counsel claim because he could not raise this issue until his first PCR petition, wherein he had no right to effective assistance. (*Id.* at 47.)

Finally, Petitioner claimed that the trial court abused its discretion and violated Petitioner's due process rights when it erroneously informed Petitioner that he would be eligible for probation after 25 years' incarceration. (*Id.*).

The appellate court denied Petitioner's appeal on April 2, 2015. (Pet. Exh. P, Doc. 1-2 at 283-86). The court stated that Petitioner's claims fell under Rule 32.1(a) – a constitutional violation – and this was not a cognizable claim for an untimely, successive PCR petition. (*Id.*). Furthermore, it stated a non-pleading defendant could not raise an ineffective assistance of PCR counsel claim in a successive PCR petition. (*Id.* at 286) (citing *State v. Mata*, 916 P.2d 1035, 1052-53 (Ariz. 1996)). In addition, since Petitioner's claim was untimely, and did not fall within any of the exceptions permitting review after the time to file has passed, his claim was precluded. (*Id.*).

The Arizona Supreme Court denied Petitioner's petition for review. (*Id.* at 281). The mandate issued September 9, 2015. (*Id.*).

- **INSTANT § 2254 HABEAS PETITION**

Petitioner filed the instant § 2254 habeas petition on March 14, 2016. (Doc. 1). The petition raises three grounds for relief: (1) that the trial court erred by erroneously informing Petitioner he would be eligible for parole after 25 years' incarceration; (2) that trial counsel was ineffective because counsel also told Petitioner he would be eligible for parole after 25 years; (3) that PCR counsel was ineffective for failing to raise trial counsel's ineffectiveness on this issue; and (4) that Arizona's Truth in Sentencing statute is unconstitutionally vague. (*Id.*).

Respondents argued that Petitioner's §2254 Petition was woefully untimely and since the state court found the successive petition to be improperly filed, the statute of limitations period was not tolled between the first and second PCR petitions. (Doc. 22 at 7). Furthermore, Petitioner cannot show that he could not have discovered the factual predicate of his claim earlier. (*Id.* at 11-12). Nor can Petitioner show that he has exercised due diligence and an extraordinary circumstance prevented him from filing in a timely manner. (*Id.*). Finally, Petitioner cannot demonstrate a fundamental miscarriage of justice occurred. (*Id.* at 13).

Petitioner replies that his second PCR petition should not have been determined untimely because under Arizona Rule of Criminal Procedure 32.1(e) there was newly-discovered material facts that excused the untimeliness and permitted a successive PCR petition. (Doc. 24 at 3). Petitioner alleges he was only made aware in August 2014 that Arizona's 1993 Truth in Sentencing laws prevented him from being eligible for parole after 25 years. (*Id.* at 5). Petitioner claims he could not have known that his sentence was any more than life with the possibility of parole after 25 years because all parties in all stages of litigation presumed his sentence allowed for this form of release. (*Id.* at 8.) "All hidden meanings violate[] [P]etitioner's guaranteed constitutional right of due process and [are] newly[-]discovered evidence since [P]etitioner was informed by the Arizona Department of Corrections in 2014 when they officially changed [P]etitioner's release eligibility for the murder conviction." (*Id*.)

In sum, Petitioner attests that his instant § 2254 habeas petition should not be considered untimely because the factual predicate for the habeas petition could not have been discovered earlier. Petitioner relied on the statements of the trial court, his attorney, the PSR, and the sentencing memorandum, as well as the release date provided by the Department of Corrections. He had no reason to second-guess his trial counsel, the trial court, and the state's explanation of his sentence. Nor did the need to challenge his sentence occur to appellate or PCR counsel because for all intents and purposes, his "release" appeared to include "release" by probation or parole. If Petitioner or counsel checked on the ADC website for Petitioner's effective release date, this date showed 25 years until 2014, wherein it changed to life. Petitioner also claims the time for filing in habeas should be equitably tolled because he diligently pursued his rights by appealing his convictions and responding immediately to this new information. He claims this revelation was an extraordinary circumstance, and once informed of the change, he pursued state remedies.

- **TRUTH IN SENTENCING LAWS**

The Truth in Sentencing laws altered the process for which an inmate can be released. Defendants sentenced prior to January 1, 1994 are eligible for parole after

serving one-half to two-thirds of the imposed sentence. A.R.S. § 41-1604.09(D) (1993). Prisoners given mandatory minimum sentences can be considered for parole after serving the mandatory time. A.R.S. § 41-1604.09(C)-(D). In addition, these inmates are guaranteed a parole hearing, and the ABEC can grant parole if an inmate behaves well and the board deems the inmate rehabilitated. A.R.S. § 41-1604.09(B); A.R.S. §31-402(A). To qualify for release from incarceration, the board must determine "that there is a substantial probability that the applicant will remain at liberty without violating the law and that the release is in the best interests of the state." A.R.S. § 31-412(A). Even if denied, a prisoner's eligibility for release can be reviewed within six months to a year. A.R.S. § 41-1604.09(D)-(G).

With the implementation of the Truth in Sentencing laws in 1994, a sentence of "life with a chance of parole after 25 years" was eliminated. The sentence was often replaced with "life with the chance of *release* after 25 years." Since January 1, 1994, at least 490 sentences in Arizona included life with the possibility of release after a minimum time. Michael Keifer, *Hundreds of People were Sentenced to Life with the Possibility of Parole. Just One Problem: It Doesn't Exist,* The Republic, March 19, 2017, at A7, available at: https://www.azcentral.com/story/news/local/arizona-investigations/2017/03/19/myth-life-sentence-with-parole-arizona-clemency/99316310/.

There is no automatic hearing granted with this sentence. At the minimum mandatory years of incarceration, an inmate may appeal to the ABEC. However, in this instance, the ABEC does not have the authority to grant a prisoner's release; it can only recommend a pardon, commutation, or reprieve, which must then be granted by the governor. A.R.S. § 31-402(A). The ABEC has a higher standard for recommending release than the former parole provisions; it must find "clear and convincing evidence that the sentence imposed is clearly excessive given the nature of the offense and the record of the offender and that there is a substantial probability that when released the offender will conform the offender's conduct to the requirements of the law." A.R.S. § 31-402(C)(2). If an inmate convicted of first-degree murder is denied review, he cannot petition for commutation again for five years. A.R.S. § 31-403(A). The possibility of a

pardon, commutation, or reprieve is remote when compared to the possibility of release on parole. *Graham v. Florida*, 560 U.S. 48, 69-70 (2010) (Eliminating parole "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days") (internal citations and quotations omitted). In fact, the disparity between the two forms of "release" is so disconcerting that the Supreme Court held that sentencing juveniles to life without the possibility of parole violates the constitutional protection against cruel and unusual punishment. *Miller v. Alabama*, 567 U.S. 460, 470 (2012).

Petitioner was nineteen years-old at the time he went to trial. (Pet. App'x B, Doc. 1-2 at 35). He is now serving a life sentence with the possibility of "release" after 25 years. The likelihood of his sentence being pardoned, commutated, or granted a reprieve by the governor is slim. In addition, he cannot begin serving his consecutive 10.5 year sentence until his whole-life sentence is completed. Under the sentence the state court claims was given to Petitioner, release will not happen in Petitioner's lifetime unless he meets the higher standard of clearly convincing not only the ABEC but the governor that the sentence is excessive. Therefore, there is a good chance that Petitioner will spend his entire life incarcerated, and never be able to complete his consecutive sentence. Petitioner claims that if this distinction had been made clear to him prior to trial, he would have taken the plea to a flat 20-year sentence for second-degree murder.

STANDARD OF REVIEW

A writ of habeas corpus under § 2254 may be evaluated by a federal court only when a petitioner alleges "that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Furthermore, a §2254 habeas petition:

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence

presented in the State court proceeding.

28 U.S.C. § 2254(d); *see also Cullen v. Pinholster*, 563 U.S. 170 (2011). When evaluating a federal habeas petition, the federal courts "owe a 'double dose of deference' to the state court's judgment." *Long v. Johnson*, 736 F.3d 891, 896 (9th Cir. 2013) (quoting *Boyer v. Belleque*, 659 F.3d 957, 964 (9th Cir. 2011)). A state court's decision is unreasonable if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 407-08 (2000). An unreasonable determination must be more than simply incorrect; it must be "so lacking in justification that there was an error . . . beyond any possibility for fairminded disagreement." *Burt v. Titlow*, — U.S. —, 134 S.Ct. 10, 10 (2013) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

- ***EXHAUSTION OF STATE REMEDIES***

For the District Court to review a writ of habeas corpus, a petitioner must show he has exhausted his state remedies by fairly presenting the same issues to the state's highest court. 28 U.S.C. § 2254(b)(1)(A); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991). To fairly present a claim, petitioner must "describe[] the operative facts and legal theory upon which his claim is based." *Duncan v. Henry*, 513 U.S. 364, 370 n.1 (1995) (quoting *Tamapua v. Shimoda*, 796 F.2d 261, 262 (9th Cir. 1986). The requirement to exhaust state remedies makes certain that the state courts are given an opportunity to address constitutional violations without the federal court's intrusion. *Rose*, 455 U.S. at 515. Failure to exhaust may lead to dismissal. *Gutierrez v. Griggs*, 695 F.2d 1195 (9th Cir. 1983). "[O]nce the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied." *Picard v. Connor*, 404 U.S. 270, 275 (1971). In Arizona, "in cases not carrying a life sentence or the death penalty, review need not be sought before the Arizona Supreme Court in order to exhaust state remedies." *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999); *see also Crowell v. Knowles*, 483 F.Supp.2d 925 (D. Ariz. 2007). However, even if a petitioner's claims are not exhausted, the District Court may deny a claim on the merits. 28 U.S.C. § 2254(b)(2).

- ***PROCEDURAL DEFAULT***

In addition to exhaustion, a procedural default also precludes review in habeas. Unlike exhaustion, wherein a federal claim has never been presented in the state court, a procedural default occurs when "a state court has been presented with a federal claim, but declined to reach the issue for procedural reasons, or if it is clear that the state court would hold the claim procedurally barred. . . . Thus, in some circumstances, a petitioner's failure to exhaust a federal claim in state court may cause a procedural default." *Casset v. Stewart*, 406 F.3d 614, 621 n.5 (9th Cir. 2005) (internal citations omitted).

The District Court may not review petitioner's federal habeas petition if petitioner presented his claims in the state court, and the state court denied the claims based on independent and adequate state grounds. *Coleman,* 501 U.S. at 728. This is because the District Court has "no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and therefore would be advisory." *Coleman,* 501 U.S. at 728.

A procedurally defaulted claim is precluded from review in a habeas unless the petitioner can show cause for the default and prejudice, or demonstrate that failing to consider the claim would cause a "fundamental miscarriage of justice." *Dretke v. Haley*, 541 U.S. 386, 393 (2004). "Cause" is a legitimate excuse that ordinarily relies on circumstances objectively unrelated to petitioner. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). This includes "a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that "some interference by officials" made compliance impracticable." *Id.* (internal citations and quotations omitted).

- ***TIMELINESS***

Petitioner's habeas corpus petition was filed in 2016, therefore it is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d). "The time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation[.]" 28 U.S.C. § 2244(d)(2). A petitioner must file a §2254 habeas petition within one year.

> [The one year statute of limitation] period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; [or]
> . . .
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

Petitioner's first PCR Petition was denied by the Court of Appeals on June 16, 2003. Petitioner had 90 days to petition the U.S. Supreme Court for review. Sup.Ct.R. 13. When he failed to do so, his judgment became final on September 14, 2003. *See Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). Petitioner then had one year from that date to file a § 2254 habeas petition. Petitioner filed the instant § 2254 habeas petition in 2016. Therefore, Petitioner's habeas petition is untimely absent a showing that the time should be equitably tolled.

- ***EQUITABLE TOLLING***

The time for filing a habeas petition is tolled if a petitioner demonstrates "(1) the petitioner pursued his rights diligently, and (2) an extraordinary circumstance prevented timely filing" *Yow Ming Yeh v. Martel*, 751 F.3d 1075, 1077 (9th Cir. 2014), cert. denied *sub nom. Yow Ming Yeh v. Biter*, 135 S. Ct. 486 (2014). "This is a very high bar, and is reserved for rare cases." *Id*. When the time for filing is equitably tolled, the one-year statute of limitations does not commence on the date of actual discovery, but on the date the factual basis for the claim "could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D).

A petitioner's individual circumstances should be evaluated when considering whether the petitioner acted diligently. *Ford v. Gonzalez,* 683 F.3d 1230, 1235 (9th Cir. 2012). This includes whether the factual basis was available to his trial, appellate, and PCR counsel. *Wood v. Spencer*, 487 F.3d 1, 4-5 (1st Cir. 2007); *Rivas v. Fischer*, 687 F.3d 514 (2nd Cir. 2012). "[I]gnorance of the law and lack of legal sophistication do not alone constitute extraordinary circumstances warranting equitable tolling." *Campbell v.*

Frink, citing *Raspberry v. Garcia*, 448 F.3d at 1154 (9th Cir. 2006). A standard that should be applicable to judges, prosecutors, and defense lawyers.

An untimely habeas petition may be considered by the District Court if failing to do so would be a "fundamental miscarriage of justice." *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1935 (2013).

DISCUSSION

Petitioner argues he is entitled to have his one-year limitation equitably tolled under § 2244(d)(1)(D). (Doc. 24 at 7). The Court agrees with Petitioner, he had no basis to question the validity of his sentence because a literal reading of the trial court transcript, Presentence Report, and Sentencing Memorandum state he would be eligible for parole after 25 years.

- ***PLAIN READING***

Here the Court need only look to the plain reading of the sentencing statute. *See Lopez v. Kearney ex rel. County of Pima*, 213 P.3d 282, 285, ¶ 12 (Ariz. App. 2009) ("[T]he court looks first to the rule's plain language, considering particular provisions in the context of the entire rule."). A natural life sentence under A.R.S. § 13-751(A)(2) specifically excludes certain types of release: commutation, parole, work furlough, work release, or release from confinement. A.R.S. § 13-751(A)(2). However, defendants sentenced to life with the possibility of release after a minimum number of years are not limited in this manner. *Id.* If the legislature intended to exclude these types of release in this subsection, it should and could have done so explicitly. The plain reading logically infers that since these forms of release are not excluded, they are included. Otherwise, distinguishing the two serves no purpose.

In addition, from review of the document created as a result of the sentence on September 22, 1999, pages 1 and 2 reflect the judge's sentence of 25 years. Thereafter, the deputy clerk for the Clerk of the Superior Court created the documents at pages 3 to 7 for the judge's signature. None of the subsequent pages were stated to defendant at the time of sentencing, except perhaps the 270 days credit towards his sentence and the order of restitution. Defendant's fingerprint at page 7 is proof of his identity, but not of his

notice of the inconsistent sentences that the document contains. The Court knows this to be true because at the time of Petitioner's sentence, this Court was on the criminal bench in Pima County Superior Court, and this procedure was common practice.

- ***USE OF WORD "PROBATION"***

Furthermore, Judge Leonardo and the prosecutor verbally informed Petitioner that if he went to trial he faced a life sentence with the possibility of "probation" at 25 years. Although Judge Marner later asserted Petitioner was adequately informed that under his life sentence, "release" meant only the possibility of release though gubernatorial forgiveness, the Court disagrees. Upon review of the transcript, the original trial judge intended just the opposite. In fact, right before proceeding to trial, Judge Leonardo again calculated Petitioner's minimum time as being in excess of 30 years, not a steadfast life sentence.

A comparison of the types of "release" demonstrate that the requirements for probation are more closely related to parole and are substantially different than that of a pardon, commutation, or a reprieve. In Arizona, probation is the court-ordered suspension of the execution of a sentence with conditional release from incarceration. A.R.S. § 13-901. Similarly, parole is a conditional release into the custody of the Arizona Department of Corrections until revocation or discharge of parole. A.R.S. § 31-412(A). This is granted solely by the ABEC without the governor's approval. A.R.S. § 31-412. Both parole and probation allow for an inmate's early release, do not reduce a sentence, and are dependent upon good behavior.

In contrast, a pardon is formal forgiveness of a crime that restores certain rights; a commutation is reduction of a sentence that the governor determines is excessive; and a reprieve delays the carrying out of a sentence. Arizona Board of Executive Clemency, Board Policy # 115: Terms and Definitions 3, 5-6 (July 6, 2017), *available at:* https://boec.az.gov/sites/default/files/documents/files/100-Definitions-Counsel_0.pdf . The trial court and prosecutor's statement that Petitioner would be eligible for "probation" at 25 years, and the court's calculation that the overall sentence upon conviction would be in excess of 30 years cannot reasonably be construed to assert the

trial court intended Petitioner to serve life without the possibility of parole. The term "probation" implies a form of release that does not require clear and convincing evidence, nor a reduction, nor indicate the necessity of gubernatorial approval.

- ***COMMON ERROR IN STATE COURT***

Finally, the state court's confusion about parole eligibility for those serving life with a minimum number of years is not an isolated event, but an error that has been repeated frequently in the Arizona courts. *See* Keifer, *supra*, at 10 (showing over 225 Arizona inmates sentenced to life with the possibility of parole after Jan. 1, 1994). If it were simply Petitioner's misconception, the recently passed 2018 Senate Bill 1211 would be unnecessary. S. 1211, 53rd Leg., 2nd Sess. (Ariz. 2018). Once effective, this bill will permit parole eligibility for pleading inmates who were sentenced to life with the possibility of parole after a minimum number of years. (*Id.*). This is regardless of the date of conviction. (*Id.*). The statutory interpretation of "release" for a life sentence with a minimum of years could be—and it appears was—determined to allow parole as a form of "release." *See* Keifer, *supra*, at 10 (51% of 500 life sentences after 1994 included a chance of parole).

- ***TIMELY FILING AND STATE'S UNREASONABLE APPLICATION OF LAW TO FACTS***

Because Petitioner reasonably relied upon the statements of the court, prosecutor, defense counsel, statute, PSR, and the sentencing memorandum, there was no reason for him to question the terms of his sentence. When the Bureau of Prisons changed his release date, this constituted newly-discovered evidence that he was subject to a sentence in excess of his original sentence. Petitioner diligently pursued avenues of relief, and should not be required to raise constitutional claims for which the entire state judicial process repeatedly missed, misconstrued, and misinformed defendants. This is an extraordinary occurrence permitting both the untimely filing and mandating the state court to follow through with the given sentence, not the *ex post facto* application of a life sentence with no parole.

Since the evidence demonstrates that the understanding of all was that Petitioner would have the ability to be "released" through probation or parole, the state court's later

insistence that Petitioner may not be released on these premises is fundamental error. This case is similar to defendants pleading guilty who were erroneously sentenced explicitly to release through parole. However, for these defendants, the legislature has ensured that parole will now become automatically available. To preclude this opportunity for release (parole) to Petitioner, while permitting relief for those who happened to have the error (the word parole instead of release) explicitly stated in the sentence is a fundamental miscarriage of justice. Furthermore, subsequently changing the terms of Petitioner's sentence from a sentence in which all understood included a likelihood of release to reward good behavior after 25 years, to an indefinite sentence is arbitrary, vague, and inconsistent with the rule of law. Such a result substitutes the rule of law for the rule of man. As the inscription on the Arizona Supreme Court building appropriately warns: Where law ends, tyranny begins.

A sentence consistent with the Presentence Report and oral dictate of the court is a court decision upon which a defendant is entitled to rely. If the sentence is illegal, it is the obligation of the state and defense counsel to file a motion to resentence or to appeal the illegal sentence. Failure to do so entitles the defendant to rely on the details in the court's order of anticipated release, and for the District Court to vacate the conviction and remand for further proceedings.

This issue is going to hit the courts in full force in 2019, when numerous defendants will be informed that their life sentence with the possibility of "release" will be converted into a life sentence without any meaningful opportunity to challenge this new sentence. This Court is not alone in questioning the propriety of sentencing a defendant to life with the possibility of "release" after 25 years without permitting any significant possibility of release when a defendant demonstrates rehabilitation. *See State v. Finley*, No. 1 CA-CR 14-0499 PRPC, 2016 WL 4046945 at ¶ 8 (Ariz. App. Jul. 28, 2016) (trial court determined "that commutation or clemency d[o] not provide meaningful opportunities for release to offenders sentenced to life with the possibility of release."); *see also*, Matthew B. Meehan, A Gathering Storm: Future Challenges Necessitate Reform of Arizona's Dysfunctional Post-Conviction Regime, 9 Ariz. Summit

L. Rev. 1, 22-31 (2016).

RECOMMENDATION

The Magistrate Judge recommends that the District Court enter an order:

1. FINDING that Viramontes' allegations satisfy the requirements for equitable tolling;
2. FINDING that Viramontes' Successive PCR Petition is timely;
3. GRANTING Viramontes' Pro Se Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody (Non-Death Penalty) (Doc. 1);
4. APPOINTING counsel under 18 U.S.C. § 3006A(a)(2) for any further proceedings before the federal courts; and
5. REMANDING to the state court for further proceedings consistent with this Report and Recommendation.

Pursuant to 28 U.S.C. § 636(b) and the Federal Rules of Civil Procedure 72(b)(2), any party may serve and file written objections within fourteen (14) days after being served with a copy of this Report and Recommendation. A party may respond to another party's objections within fourteen (14) days after being served with a copy of the objection. Filed objections should use the following case number:

No. CV-16-00151-RM.

Failure to timely object to the factual and legal determinations of the Magistrate Judge may waive Petitioner's right to *de novo* review. The Clerk of Court shall send a copy of this Report and Recommendation to all parties.

Dated this 4th day of May, 2018.

Bernardo P. Velasco
United States Magistrate Judge